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Honorable William W. Wilkins, Jr., Chair

November 9, 2000

To: The Chair and Members of the Sentencing Commission:

On behalf of the Judicial Conference Committee on Criminal Law, the attached proposed definition of loss and proposed loss table are submitted for your consideration. It is our hope that you will publish them for public comment as part of the Commission's Economic Crime Package in 2001. The Committee's proposed loss definition is based upon, and offers improvements to, the April 1998 field-tested proposed loss definition. The Committee's proposed, consolidated loss table for §§2B1.1 and 2F1.1 utilizes portions of several previous table proposals. In these ways, both proposals build upon the previous work of the Commission and the Committee. The Committee's proposals are based on the assumption that the adjustment for more than minimal planning would be eliminated.

All members of the Committee have endorsed the attached proposed loss definition and loss table for publication for public comment, as the Commission begins its amendment cycle. Individual members might suggest different provisions and language here and there, but we came together to form a consensus on this submission, with the understanding that there will be an opportunity to submit final comments during and after the public comment period.

We look forward to working with the Commission in its development of this and other aspects of its Economic Crime Package in the 2001 amendment cycle.

With highest personal regards, I am

Sincerely,

William W. Wilkins, Jr.

Enclosure: "Summary: Proposed Definition of Loss and Loss Table by the Committee on Criminal Law" (with 4 attachments)

cc: All members of the Sentencing Commission
All members of the Committee on Criminal Law
John Hughes, Chief, FCSD

***Summary: Proposed Definition of Loss and Loss Table
by the Committee on Criminal Law***

The Judicial Conference Committee on Criminal Law submits the attached proposed definition of loss and proposed consolidated loss table for the Commission's consideration and requests that they be published for public comment as part of its Economic Crime Package for the 2001 amendment cycle. The proposed definition of loss builds upon the previous joint work of the Commission and Committee in the successful field testing of the April 1998 draft definition, and recommends only those changes that the field test and subsequent review have indicated are merited. The proposed loss table also draws upon features of several previous table proposals considered by the former Commission in 1998.

I. Background

The effort to reform the loss definition grew out of a growing sense that the current loss definition could be better organized, and the numerous circuit conflicts that have surrounded the interpretation of the loss provisions need to be resolved. In addition, it could benefit from a causation standard, as well as guidance on when loss is to be measured.

The effort to reform the loss tables grew from two separate undercurrents. One was a longstanding view that the offense levels for white collar offenses that result in significant amounts of loss have traditionally been, both before and after the guidelines, too low. This view is grounded upon considerations of proportionality, deterrence, and just punishment. Another impetus for reforming the loss table was the Commission's consideration in the late-1990's of "simplifying" the guidelines. This resulted in several proposals related to the loss tables, including the consolidation of the loss tables for the fraud and theft guidelines, the use of fewer, 2-level loss categories, and the incorporation of the frequently applied more than minimal planning adjustment, which would be eliminated.

The Committee has participated extensively in the former Commission's efforts to amend the tables and loss, beginning in 1997.¹ The Committee favored raising offense levels for high-loss economic crimes, and previously proposed amending the loss table. The attached proposal is modified somewhat in recognition of intervening amendments, and it also proposes lowering offense levels for low-loss offenses to maximize judicial discretion to fashion appropriate sentences for such offenses.²

¹See, testimony of Judge J. Phil Gilbert, submitted on behalf of the Committee on Criminal Law for the public hearing sponsored by the U.S. Sentencing Commission in November 1997.

²Several members of the Committee would prefer to more severely limit the number of loss categories.

The Committee also saw the effort to amend the loss definition as an opportunity to simplify the loss analysis and to resolve numerous circuit conflicts. The Committee provided significant input into the development of the April 1998 draft definition of loss, and co-sponsored with the Commission its 1998 field test. The field test produced predominantly favorable results, and the test format was widely viewed as a constructive model for future trials of major guideline reforms.³ Nearly two dozen federal judges (including the Committee) and a dozen experienced probation officers applied the draft definition to randomly selected previously sentenced cases, self-chosen previously sentenced cases, and to a complex hypothetical scenario.

The results were evaluated by participants during the testing, both on a case-by-case basis and on an overall basis. In addition, a full-day debriefing of the test participants was held to review the results and to suggest changes to the draft, where needed. Nearly all participants found the organization and workability of the April 1998 draft definition clearly superior to that of the current definition. In addition, the draft did not produce markedly different results than did the current definition, when applied to the same set of facts, confirming that the proposed loss definition was generally “substantive-neutral.”⁴

The outgoing Commission expressed the hope that the effort to amend the definition of loss and the loss tables would be resumed by the next Commission. It published in the fall of 1998 the field-tested loss definition and a proposed loss table, for comment and for consideration by the next Commission, and the new Commission has indicated its intent to resume consideration of an Economic Crime Package in 2001.

II. The Committee’ Proposed Definition of Loss

In the process of developing an updated proposed loss definition for the Commission’s consideration in 2001, the Committee concluded it was reasonable to resume where the former Commission and Committee left off. That is, it began with the assumption that the field-tested April 1998 draft definition was presumptively valid, considering the extensive development and testing processes from which it resulted. No other guideline change has undergone as extensive field testing nor was developed based on as wide input as the April 1998 draft definition of loss. The Committee sought to propose only those changes to the April 1998 draft for which either the field test or subsequent review, by either Commission staff or the Committee, has indicated are needed or helpful.

The “CLC Proposed 2001 Draft Definition of Loss” is attached, as is an executed version that shows how it differs from the April 1998 draft. The following is a brief description of the notable points

³See, “A Field Test of Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines: A Report to the Commission,” U.S. Sentencing Commission, October 20, 1998.

⁴See, “Revised Definition of Loss: Final Report - Draft for Comment,” Economic Crimes Policy Team, U.S. Sentencing Commission, April 25, 2000 (hereinafter Final Report).

of the Commission's proposed 2001 draft definition:

(A) Basic Rule. The April 1998 draft's basic rule is retained, which is the same as the current rule: Loss is the greater of actual or intended loss. The general rule is familiar and has not produced any significant problems in the case law. It is, however, moved from its current position in the application notes to a prominent position, which begins an orderly, sequential analysis, carried throughout. This logical format was highly approved by the field test participants.

Reasonably foreseeable harm. The April 1998 draft causation standard of "reasonably foreseeable" harm is retained. It was generally well received by the test participants, although they requested further explanation and examples, both of which are provided in the Committee's proposed definition, as noted below. Small terminology changes provide modest improvements, and a reference to §1B1.3 is added to clarify the scope of the conduct to be considered, for both actual and intended loss.

Intended loss. The April 1998 draft's definition of intended loss is retained, along with the resolution to the circuit conflict on reverse stings. However, an example of insurance fraud, suggested by Commission staff subsequent to the field testing, is added in order to provide further assistance to courts. It also adds that the defendant would only be held responsible for loss that reasonably would have "*resulted if the facts were as the defendant believed them to be,*" which is intended to ensure fairness to the defendant.

(B) Exclusions from Loss. This organizational category was suggested by the Commission staff after the field testing and provides a logical place for several related concepts:

(i) *Interest.* The Committee's proposed definition would exclude interest, consistent with the choice of the majority of the field test participants of the two options provided in the April 1998 draft. The Committee recommends that if the Commission concludes that interest should be addressed, it should do so only as a departure.

(ii) *Government and victim costs.* The Committee's proposed definition adopts the suggestion of Commission staff to clarify that victim costs are excluded (as well as the government's costs), in response to field test participants' suggestions that this commonly-occurring issue be settled, to provide guidance and to avoid ambiguity, litigation, and unnecessary disparity. They also concluded that excluding such costs avoids tedious fact-finding on matters that have little or no bearing on the defendant's culpability. The proposed draft moves this provision from the Background of the April 1998 draft, so that it not be overlooked.

(C)(i) Credits in Determining Loss. Although there was significant concern voiced by some test participants about this concept, the Committee decided to retain the April 1998 approach, which is to specify a crediting rule for benefits returned to the victim prior to detection. This resolves a circuit conflict, provides an incentive for early return of property, and eliminates disparate treatment of fraud and theft cases (the primary implication of the theft commentary would deny credit, while the fraud commentary would allow crediting in certain situations). The subtitle is improved to read credits in “determining,” rather than “against,” loss.

a) *De minimis value exception:* This provision replaces the April 1998 draft provision which excepted from crediting benefits “of little or no value to the victim” that are “substantially different from what the victim intended to receive.” The Committee believes its objective-perspective provision permits the court to exclude benefits of “de minimis” value without determining the victim’s subjective intent.

b) *Fraudulently rendered services and regulatory offenses:* [Note: Three members of the Committee would not include this exclusion from crediting.] The first part, regarding professional services, was suggested by the Commission staff’s final report,⁵ and is consistent with the strong sentiment of several test participants and the government that such services not be “credited” to the defendant. The Committee also concluded that this exception to crediting would spare courts the difficult task of determining the value of, for example, a will made by someone posing to be a lawyer or a physical exam conducted by a non-physician. The provision also recognizes the potential seriousness of such offenses.

The second part, regarding regulatory offenses, addresses a major concern of the government and several test participants and some case law. By adding this exception to crediting, a simpler rule on Gain can be adopted, as explained below. Also, again, this provision recognizes the serious potential of such offenses. While departure, as always, would be available in the unusual case, this provision avoids the necessity of courts computing these often difficult-to-value goods and services in the ordinary case.

(ii) *Fraudulent investment schemes.* This is one of two significant organizational changes made by the Committee’s draft. The Committee places this former “special rule” here, and eliminates the need, raised in the field test, to specify that this particular special rule is in lieu of, and not in addition to, the general crediting rule. Placed here, it is seen for what it is: a special application of the crediting rule. The draft uses the term “investor” rather than “individual investor,” to avoid any potential confusion to individual v. corporate investors.

⁵See Final Report, supra.

(D) Time of measurement. The addition of this category is the second significant organizational change made by the Committee to the structure of the April 1998 draft. This section provides a general rule for time of measurement, missing from both the current commentary and the April 1998 draft. The Committee adopts the majority case law view of measuring loss at the time of detection, and defines the term in subsection (i). The timing rule is clarified as applicable for crediting as well in subsection (ii). The special timing rule for collateral is placed in subsection (iii), rather than under crediting, which allows all rules relating to timing to be stated in one place, for easy reference.

(E) Estimation of loss. The Committee adopts the Commission staff's suggested change from "determination" to "estimation," to underscore the principal point made therein that loss need not be determined precisely. This then becomes the best place for the provision on deference due to the sentencing judge's determination, which was the final subsection of the April 1998 definition. The factors are otherwise substantially as they were in the April 1998 draft.

(F) Gain. The current "rule" on gain is found in note 9 to §2F1.1: "The offender's gain from committing the fraud is an alternative estimate that ordinarily will underestimate the loss." The April 1998 draft provided for the use of gain where it "more accurately reflects the seriousness of the offense," and "is greater than loss." The latter, "greater than," provision was sought by the government to ensure that gain would be used in offenses with zero loss, as is often the case with regulatory offenses. However, this provision brought on new complications, including the field-test participants' concern that gain would not have to be computed in every case to compare it to loss, and that if loss is net, perhaps gain would also have to be net, i.e. excluding the costs of operating the criminal business.

The Committee's draft resolves these concerns by treating regulatory offenses as an exclusion from crediting (see C(i)(b), above), which permits a computation of loss in such cases, and eliminates the need for the "greater than" prong of the April 1998 draft. The Committee's draft uses a simple rewording of the current rule, stating that gain is to be used as an alternative measure of loss "*when loss cannot otherwise reasonably be determined, but the defendant's gain can be determined.*" The restriction of its use to only where loss "cannot otherwise reasonably be determined" prevents gain from being used whenever the defendant's personal gain is less than the relevant conduct loss.

(G) Special Rules: The Committee's draft moves the special rule on fraudulent investment schemes to a new location under the crediting rules. The other special rules are substantially as they were in the April 1998 draft. The credit card rule is changed from \$100 to \$500 to reflect current law (the Committee anticipates that the Commission will conform any new loss definition to fully incorporate other current provisions, such as the remaining part of the November 1, 2000 amendment on access devices). The draft adds an example of diversion of

government program benefits involving food stamps, as suggested by Commission staff, in response to field test participants' requests for more examples of application of the definition.

(H) Departure Considerations. The Committee's draft places both upward and downward suggested departures under a subsection entitled "Departure Considerations." The fact that departure suggestions are listed together, as they were in the April 1998 draft, is an improvement over their scattered placement in the current loss commentary.

(1) *Upward departures.* The Committee's draft eliminates the April 1998 upward departure suggestions for endangering national security, causing the loss of confidence in an important institution, impacting numerous victims, or understating the aggregate harm - as either duplicated in other guideline adjustments or as occurring too infrequently to merit suggestion. The other upward departures in the April 1998 draft are retained. The Committee adds a suggested upward departure where the offense involved a substantial risk that a victim would lose a significant portion of his or her net worth or suffer other significant financial hardship.

(2) *Downward departures.* The Committee retained and streamlined the suggested downward departure for a primary mitigating, non-monetary objective. It eliminated the downward departure for restitution as duplicative of the crediting rule. The Committee proposes a new suggested downward departure for cases where the loss significantly exceeds the greater of the defendant's actual or intended personal gain and therefore overstates the defendant's culpability, in response to longstanding and persuasive arguments by the defense bar that such a departure suggestion is merited in some cases.

[Omission of §2X1.1 application note. The Committee's draft does not include the current commentary note on the use of §2X1.1, nor the expanded version of that note in the April 1998 draft, which tried to clarify this provision. The test participants expressed considerable sentiment that the provision be eliminated, especially given that most frauds are "incomplete" when detected or interrupted.⁶]

Background Commentary. The Committee's draft eliminates the last sentence of the first paragraph of the April 1998 background commentary (on overlapping offense levels) as unnecessary, especially given the anticipated adoption of 2-level loss categories in the proposed loss table. Also, in response to test participants' suggestions, the Committee's draft omits the word "consequential" in the first line of the second paragraph, but substitutes the term "indirect," to provide accurate guidance to courts in applying the reasonably foreseeable causation standard.

⁶For example, Judge Julie Carnes, a former Commissioner and a test participant, provided a thorough and persuasive written explanation of the perils of its inclusion as part of her general evaluation of the April 1998 draft.

The Committee's draft retains the April 1998 example of indirect harms in computer offenses in the Background. The test participants voiced a strong desire for even more examples of "reasonably foreseeable" harms. This example, as one of the few given, should be retained for this reason, as well as to clarify that the current rule for computer crimes is not intended to be changed. (The current rule is in note 2 for §1B1.1, but it would be eliminated in a rewrite of the reformed definition of loss.)

To provide even more examples of "reasonably foreseeable" harm, as requested by the test participants, and to also indicate the current rule would be unchanged regarding these offenses, the Committee's draft adds two additional examples, using the two types of cases currently specified in the commentary notes to §2F1.1 as "exceptions" where "consequential" damages would be included in loss: product substitution cases and defense contract fraud cases.

III. The Committee's Proposed Loss Table

The Committee also requests that the Commission publish for comment the proposed consolidated loss table for guidelines 2B1.1 and 2F1.1, attached. A similar table would presumably be adopted for tax offenses. The proposed table is presented in two formats: a chart entitled "CLC Proposed 2001 Loss Table," and a colored graph entitled "Alternative Fraud Proposals," on which the Committee's proposal is portrayed as a yellow line.

The Committee has combined portions of several previously proposed tables. This proposal, and all previous proposed loss tables, would raise offense levels for offenses resulting in over \$1.2 million in loss identically. It proposes slightly lower offense levels than those the Committee previously proposed for offenses resulting in loss amounts below \$800,000, and in particular for losses below \$40,000.⁷

The chart of the proposed table indicates the loss breakpoints of the proposed table in the first column from the left, and the multipliers used to progress from one breakpoint to another in the second column from the left (column "2"). The proposed offense level increase for each loss breakpoint is shown in column 3, and the resulting offense level is shown in column 4. Finally, the table indicates the current offense level, with more than minimal planning, for these same loss amounts if the current §2F1.1 loss table were used.⁸

The attached colored graph offers a comparison of the Committee's proposed table with current and previously proposed offense levels. The 6 lines of the graph compare the Committee's new

⁷The Committee realizes that the Commission will need to consider whether adjustments may be necessary to some of the guidelines (such as that for insider trading or bribery) that refer to the loss tables, as part of any reform of the loss table.

⁸Different breakpoints are used in the proposed and current tables for amounts above \$40,000.

proposed table (“2000 CLC”) in yellow to current offense levels with and without the more than minimal planning adjustment (solid and broken white), to the table the Committee previously jointly proposed with the Department of Justice (1998 CLC/DOJ) in red, to the current offense level with the newly enacted sophisticated means in grey, and to the April 1998 Option (published by the outgoing former Commission) in purple. By comparison, the Committee’s proposed table (in yellow) retains a low offense level of 6 for offenses up to \$5,000 - even lower than the April 1998 proposal, and then follows that proposal up to \$120,000.

The Committee’s proposed table is intended to accomplish three primary goals. First, it incorporates the simplification features widely accepted as beneficial: it consolidates the loss tables for fraud and theft, utilizes fewer and larger two-level, rather than one-level, loss-amount categories, and incorporates the more than minimal planning enhancement, which would be eliminated. Second, it implements two kinds of severity level increases. As indicated in column 4, the proposed table incorporates one point of the more than minimal planning enhancement at \$10,000, and the second point at \$20,000,⁹ which would be eliminated entirely.

It also implements a substantive severity increase, starting with one offense level for cases resulting in more than \$40,000 in loss, and going to two levels for more than \$80,000 in loss. Commission data indicate that only one third of the cases sentenced in FY 1999 under §2F1.1 fall above \$70,000, making the proposed severity increase applicable to less than one third of the cases sentenced under §2F1.1. Moreover, this increase is moderate, not reaching three levels until \$160,000, four levels at \$7.5 million, five levels at \$50 million, and 6 levels at \$125 million.¹⁰

Finally, the Committee’s proposed table would lower some low-loss offense levels, even lower than in the final proposal published by the Commission in 1998, for several reasons. The Committee’s proposal brings more cases resulting in \$20,000 or less in loss into the sentencing “zones” at level 12 and below, in which the courts have maximum discretion to fashion an appropriate sentence, providing alternative sentences for those who arguably may most benefit from them.¹¹ Moreover, such a modification of the loss table to provide additional judicial discretion for low-loss economic offenders would also permit further implementation of the statutory directive in 28 U.S.C. § 994(j) that first

⁹Commission data for FY 1999 indicates that the more than minimal planning enhancement was imposed in 72% of cases using the theft guideline (§2B1.1) with over \$5,000 loss, and in 83.3% of cases using the fraud guideline (§2F1.1) at that same loss amount and above.

¹⁰All proposed loss tables have been identical above \$1.2 million.

¹¹Commission data indicate that judges use this discretion sparingly. For example, of those cases sentenced in FY 1999 that were eligible for pure probation, 29.7% were sentenced to prison, 6.9% to a “split” sentence, and 63.4% to pure probation; of those falling in zone C, where some intermittent confinement is possible, 49.9% were sentenced to prison. See Table 16, “Type of Sentence Imposed on Offenders in Each Sentencing Zone,” 1999 Sourcebook of Federal Sentencing Statistics, U.S. Sentencing Commission, 2000, p. 34.

offenders of non-serious offenses be given special consideration for non-imprisonment sentences.¹²

IV. Conclusion

The Committee asks the Commission to consider the attached proposed definition of loss and proposed loss table for publication for public comment.

Attachments

CLC Proposed 2001 Draft Definition of Loss

CLC Proposed 2001 Draft - Compared to the April 1998 Draft

CLC Proposed 2001 Loss Table (chart)

“Alternative Fraud Proposals” (colored graph)

¹²28 U.S.C. § 994(j) states in pertinent part: “The Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense...”

CLC PROPOSED 2001 DRAFT DEFINITION OF LOSS

In the Commentary to §§2B1.1 and 2F1.1 captioned "Application Notes" insert after Note 1 the following new Note 2:

2. *For purposes of subsection (b)(1)—*

(A) *General Rule.* *Loss is the greater of the actual loss or the intended loss.*

"Actual loss" means the reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).

"Reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances of the particular case, reasonably should have known likely would result in the ordinary course of events from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).

"Intended loss" means the pecuniary harm that was intended to result from the conduct for which the defendant is accountable under §1B1.3, even if that harm would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an intended insurance fraud in which the claim exceeded the insured value), so long as the intended loss would reasonably have resulted if the facts were as the defendant believed them to be.

(B) *Exclusions from Loss.* – *Loss does not include the following:*

- (i) *Interest of any kind, finance charges, late fees, penalties, anticipated profits, or amounts based on an agreed-upon return or rate of return.*
- (ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense, even if such costs are reasonably foreseeable.*

(C) *Credits In Determining Loss.*

- (i) *Loss shall be determined by excluding the value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the offense was detected. However, loss shall not be reduced by the value of:*

- (a) *benefits of de minimis value transferred by the defendant to the victim(s).*
 - (b) *services fraudulently rendered to victims by persons falsely posing as licensed professionals, or goods falsely represented as approved by a governmental regulatory agency, or goods for which regulatory approval by a government agency was obtained by fraud.*
 - (ii) *In a case involving a fraudulent investment scheme, such as a “Ponzi scheme,” the loss shall not be reduced by the value of the economic benefit transferred to any investor in the scheme in excess of that investor’s principal investment (i.e., the gain to one investor in the scheme shall not be used to offset the loss to another investor in the scheme).*
 - (iii) *For purposes of this subsection: (A) “economic benefit” means money, property, or services performed; and (B) “transferred” includes pledged or otherwise provided as collateral, returned, repaid, or otherwise conveyed.*
- (D) *Time of measurement:* *Loss should ordinarily be measured at the time the offense was detected.*
- (i) *For purposes of this guideline, an offense is detected when the defendant knew or reasonably should have known that the offense was detected by a victim or a public law enforcement agency.*
 - (ii) *Except as provided in subsection (D)(iii), the value of any “economic benefit” transferred to the victim by the defendant for purposes of Subsection (C) shall be measured at the time the offense was detected.*
 - (iii) *However, in a case involving collateral pledged by a defendant, the “economic benefit” of such collateral to the victim for purposes of Subsection (C) is the amount the victim has recovered at the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the “economic benefit” of the collateral is its value at the time of sentencing.*
- (E) *Estimation of Loss.* *The court need not determine the precise amount of the loss. Rather, it need only make a reasonable estimate of loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that*

evidence. For this reason, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).

The estimate of the loss shall be based on available information, taking into account and using as appropriate and practicable under the circumstances, factors such as the following:

- (i) *The fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, or destroyed; or if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property or other thing of value.*
 - (ii) *The cost of repairs to damaged property, not to exceed the replacement cost had the property been destroyed.*
 - (iii) *The approximate number of victims multiplied by the average loss to each victim.*
 - (iv) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*
- (F) Gain. *The court shall use the defendant's gain as an alternative measure of loss when loss cannot otherwise reasonably be determined, but the defendant's gain can reasonably be determined.*
- (G) Special Rules. *The following special rules shall be used to assist in determining actual loss in the cases indicated:*
- (i) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes. *In a case involving stolen or counterfeit credit cards (see 15 U.S.C. § 1602(k)), stolen or counterfeit access devices (see 18 U.S.C. § 1029(e)(1)), or purloined numbers or codes, the actual loss includes any unauthorized charges made with the credit cards, access devices, or numbers or codes. The actual loss determined for each such credit card, access device, number or code shall be not less than \$500.*
 - (ii) Diversion of Government Program Benefits. *In a case involving diversion of government program benefits, actual loss is the value of the benefits diverted from intended recipients or uses. For example, if the defendant was the lawful recipient of food stamps having a value of \$100 but*

fraudulently received food stamps having a value of \$150, the loss is \$50.

- (iii) *Davis-Bacon Act Cases. In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the actual loss is the difference between the legally required and actual wages paid.*

(H) Departure Considerations.

- (1) Upward Departure Considerations. *There may be cases in which the loss substantially understates the seriousness of the offense or the culpability of the defendant. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:*
 - (a) *A primary objective of the offense was an aggravating, non-monetary objective, such as to inflict emotional harm.*
 - (b) *The offense resulted in or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest.*
 - (c) *The offense created a risk of substantial loss beyond the loss determined above.*
 - (d) *The offense endangered the solvency or financial security of one or more victims.*
 - (e) *The offense involved a substantial risk that a victim would lose a significant portion of his or her net worth or suffer other significant financial hardship.*
- (2) Downward Departure Considerations. *There ~~also~~ may be cases in which the loss substantially overstates the seriousness of the offense or the culpability of the defendant. In such cases, a downward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a downward departure is warranted:*
 - (a) *The primary objective of the offense was a mitigating, non-monetary objective, such as to fund medical treatment for a sick parent. However, if, in addition to that primary objective, a substantial objective of the offense was to benefit the defendant economically, a downward departure for this reason would not ordinarily be warranted.*
 - (b) *The loss significantly exceeds the greater of the defendant's actual or intended personal gain, and therefore significantly overstates*

the culpability of the defendant.

* * *

Background:

* * *

The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline.

Both direct and indirect pecuniary harm that is a reasonably foreseeable result of the offense will be taken into account in determining the loss. For example, in an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer," as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), "loss" is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense. Likewise, in a product substitution case, the loss includes the victim's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or modifying the product so that it can be used for its intended purpose, plus the victim's reasonably foreseeable cost of correcting the actual or potential disruption to the victim's business caused by the product substitution. Similarly, in a defense contract fraud case, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable.

* * *

[Make all technical and conforming amendments necessary to fully execute this amendment.]

CLC PROPOSED 2001 DRAFT DEFINITION OF LOSS
[With Changes Indicated to the April 1998 Draft]

In the Commentary to §§2B1.1 and 2F1.1 captioned "Application Notes" insert after Note 1 the following new Note 2:

2. *For purposes of subsection (b)(1)—*

(A) *General Rule.* *Loss is the greater of the actual loss or the intended loss.*

"Actual loss" means the reasonably foreseeable pecuniary harm that resulted or will result from the conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct).

"Reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances of the particular case, reasonably should have known ~~would~~ likely would result ~~follow~~, in the ordinary course of events, as a result of from that the conduct: for which the defendant is accountable under §1B1.3 (Relevant Conduct).

"Intended loss" means the pecuniary harm that was intended to result from ~~be caused by~~ the conduct for which the defendant is accountable under §1B1.3, even if that harm would have been ~~unlikely or impossible to accomplish~~ impossible or unlikely to occur (e.g., as in a government sting operation), or an intended insurance fraud in which the claim exceeded the insured value), so long as the intended loss would reasonably have resulted if the facts were as the defendant believed them to be.

(B) *Exclusions from Loss.* *– Loss does not include the following:*

(i) *Interest of any kind, finance charges, late fees, penalties, anticipated profits, or amounts based on an agreed-upon return or rate of return.*

(ii) *Costs to the government of, and costs incurred by victims primarily to aid the government in, the prosecution and criminal investigation of an offense, even if such costs are reasonably foreseeable.*

~~(C)(D)~~ Credits In Determining ~~Against~~ Loss.

- (i) ~~Except as provided in the subdivision (F)(i),~~ Loss shall be determined by excluding ~~reduced by~~ the value of the economic benefit the defendant or other persons acting jointly with the defendant transferred to the victim before the ~~defendant knew or should have known that the~~ offense ~~had been~~ was detected. However, loss shall not be reduced by the value of:
- (a) benefits of de minimis value transferred by the defendant to the victim(s); or
 - (b) services fraudulently rendered to victims by persons falsely posing as licensed professionals, or goods falsely represented as approved by a governmental regulatory agency, or goods for which regulatory approval by a government agency was obtained by fraud.
- (ii) In a case involving a fraudulent investment scheme, such as a "Ponzi scheme," the loss shall not be reduced by the value of the economic benefit transferred to any investor in the scheme in excess of that investor's principal investment (i.e., the gain to one investor in the scheme shall not be used to offset the loss to another investor in the scheme).
- (iii) For purposes of this subdivision: (i) section: (A) "economic benefit" ~~includes~~ means money, property, or services performed; and (ii) (B) "transferred" ~~means~~ includes pledged or otherwise provided as collateral, returned, repaid, or otherwise conveyed.

~~In the case of collateral, the value of the economic benefit is the amount the victim has recovered as of the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the value is its fair market value as of the time of sentencing.~~

~~In any other case, the value of the economic benefit is its fair market value as of the time of transfer to the victim.~~

~~However, in cases in which the economic benefit transferred to the victim has little or no value to the victim because it is substantially different from what the victim intended to receive, loss shall not be reduced by the value of that economic benefit.~~

- (D) Time of measurement: Loss should ordinarily be measured at the time the offense was detected.

- (i) *For purposes of this guideline, an offense is detected when the defendant knew or reasonably should have known that the offense was detected by a victim or a public law enforcement agency.*
- (ii) *Except as provided in subsection (D)(iii), the value of any “economic benefit” transferred to the victim by the defendant for purposes of Subsection (C) shall be measured at the time the offense was detected.*
- (iii) *However, in a case involving collateral pledged by a defendant, the “economic benefit” of such collateral to the victim for purposes of Subsection (C) is the amount the victim has recovered at the time of sentencing from disposition of the collateral. If the collateral has not been disposed of by that time, the “economic benefit” of the collateral is its value at the time of sentencing.*

~~(B)~~(E) **Determination Estimation of Loss.** *The court need not determine the precise amount of the loss. Rather, it need only make a reasonable estimate of loss. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. For this reason, the court’s loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).*

The estimate of the loss shall be ~~that amount,~~ based on available information, taking into account, ~~and using;~~ as appropriate and practicable under the circumstances ~~to best effectuate the general rule in subdivision (A)~~, factors such as the following:

- (i) *The fair market value of the property, or other thing of value, taken or otherwise unlawfully acquired, misapplied, misappropriated, or destroyed; or if the fair market value is impracticable to determine or inadequately measures the harm, the cost to the victim of replacing that property or other thing of value. ~~taken or otherwise unlawfully acquired or destroyed.~~*
- (ii) *The cost of repairs to damaged property, not to exceed the replacement cost had the property been destroyed.*
- (iii) *The approximate number of victims multiplied by the average loss to each victim.*
- (iv) *More general factors, such as the scope and duration of the offense and revenues generated by similar operations.*

~~(C)~~(F) **Gain.** *The court shall use the defendant’s gain ~~instead of~~ as an alternative measure of loss ~~under subsection (b)(1) if both (i) gain is greater than loss (which may be zero); and (ii) gain more accurately reflects the seriousness of the offense. when~~*

loss cannot otherwise reasonably be determined, but the defendant's gain can reasonably be determined.

Option 1:

- (E) ~~Opportunity Costs. Interest (of any kind), anticipated profits, and other opportunity costs shall not be included in determining loss. However, there may be cases in which the amount of interest, anticipated profits, and other opportunity costs is so substantial that not including that amount as part of the loss would substantially understate the seriousness of the offense or the culpability of the defendant. In such cases, an upward departure may be warranted.~~

Option 2:

- (E) ~~Interest. Interest shall be included in determining loss only if it is bargained for as part of a lending transaction that is involved in the offense. The court shall include any such interest that is accrued and unpaid as of the time the defendant knew or should have known that the offense had been detected.~~

- (G)(F) Special Rules. The following special rules shall be used to assist in determining actual loss in the cases indicated:

(i) ~~Fraudulent Investment Schemes. In a case involving a fraudulent investment scheme, such as a Ponzi scheme, actual loss is the sum of the net actual losses of each victim who lost all or part of that victim's principal investment as a result of the fraudulent investment scheme. Because this subdivision provides, in cases covered hereunder, for determination of the net loss of each victim, subdivision (D) relating generally to credits against loss, shall not apply to such cases.~~

(i)(ii) Stolen or Counterfeit Credit Cards and Access Devices; Purloined Numbers and Codes. In a case involving stolen or counterfeit credit cards (see 15 U.S.C. § 1602(k)), stolen or counterfeit access devices (see 18 U.S.C. § 1029(e)(1)), or purloined numbers or codes, the actual loss includes any unauthorized charges made with the credit cards, access devices, or numbers or codes. The actual loss determined for each such credit card, access device, or number or code shall be not less than \$100:500.

(ii)(iii) Diversion of Government Program Benefits. In a case involving diversion of government program benefits, actual loss is the value of the benefits diverted from intended recipients or uses. For example, if the defendant was the lawful recipient of food stamps having a value of \$100 but fraudulently received food stamps having a value of \$150, the loss is \$50.

(iii)(iv) Davis-Bacon Act Cases. In a case involving a Davis-Bacon Act violation (i.e., a violation of 40 U.S.C. § 276a, criminally prosecuted under 18 U.S.C. § 1001), the actual loss is the difference between the legally required and

actual wages paid.

~~(H)~~(G) Upward Departure Considerations.

- (1) Upward Departure Considerations. There may be cases in which the loss substantially understates the seriousness of the offense or the culpability of the defendant. In such cases, an upward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether an upward departure is warranted:
- (i a) A primary objective of the offense was an aggravating, non-monetary objective. ~~For example, a primary objective of the offense was such as to inflict emotional harm.~~
 - (ii b) The offense ~~caused~~ resulted in or risked substantial non-monetary harm. For example, the offense caused physical harm, psychological harm, or severe emotional trauma, or resulted in a substantial invasion of a privacy interest.
 - (iii c) The offense created a risk of substantial loss beyond the loss determined above.
 - ~~(iv) The offense (I) endangered national security or military readiness; or (H) caused a loss of confidence in an important institution.~~
 - ~~(v d) The offense (H) endangered the solvency or financial security of one or more victims; or (H) impacted numerous victims and the loss determination substantially understates the aggregate harm.~~
 - (e) The offense involved a substantial risk that a victim would lose a significant portion of his or her net worth or suffer other significant financial hardship.

~~(H)~~(2) Downward Departure Considerations. There ~~also~~ may be cases in which the loss substantially overstates the seriousness of the offense or the culpability of the defendant. In such cases, a downward departure may be warranted. The following is a non-exhaustive list of factors that the court may consider in determining whether a downward departure is warranted:

- (i a) The primary objective of the offense was a mitigating, non-monetary objective, such as to fund medical treatment for a sick parent. ~~For example, the primary objective of the offense was to fund medical treatment for a sick parent. †However, if, in addition to that primary objective, a substantial objective of the offense was to benefit the defendant economically, a downward departure for this reason would not ordinarily be warranted.‡~~

~~(ii) — The defendant made complete, or substantially complete, restitution prior to the time the defendant knew or should have known that the offense had been detected.~~

~~(b) The loss significantly exceeds the greater of the defendant's actual or intended personal gain, and therefore significantly overstates the culpability of the defendant.~~

~~(1) — Appropriate Deference. The sentencing judge is in a unique position to assess the evidence and estimate the loss based upon that evidence. Accordingly, the court's loss determination is entitled to appropriate deference. See 18 U.S.C. § 3742(e) and (f).~~

~~3. — In some cases in which the amount of intended loss exceeds the actual loss, whether some of the intended loss would have occurred may be speculative. In such cases, the offense level ordinarily applicable to that amount of intended loss sometimes must be reduced, in accordance with §2X1.1. (Conspiracies, Attempts, Solicitations). Specifically, in a case involving only inchoate offense conduct (i.e., a case in which the defendant was convicted only of an attempt, conspiracy, or solicitation, and in which the offense involved only intended loss), a decrease of three levels sometimes may apply, as provided under §2X1.1.~~

~~Similarly, in the case of a partially completed offense (e.g., an offense involving a completed fraud that is part of a larger, attempted fraud in which both actual loss and additional intended loss result), the offense level is to be determined, and may be decreased in some cases, in accordance with the provisions of §2X1.1, whether the defendant is convicted of the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both. As explained more fully in Application Note 4 of the Commentary to §2X1.1, in such a case, a three-level decrease in the offense level for the intended loss sometimes may apply, except that the offense level for the intended loss, with or without a three-level decrease, shall not be used if it is less than the offense level for the actual loss.~~

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Background:

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~~The Commission has determined that, ordinarily, the sentences of defendants convicted of federal offenses should reflect the nature and magnitude of the pecuniary harm caused by their crimes. Accordingly, along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under this guideline. Because of the structure of the Sentencing Table (Chapter 5, Part A), subsection (b)(1) results in an overlapping range of enhancements based on the loss.~~

~~Both direct and consequential~~ indirect pecuniary harm that is a reasonably foreseeable

result of the offense will be taken into account in determining the loss. Accordingly, in any particular case, the determination of loss may include consideration of factors not specifically set forth in this guideline. For example, in an offense involving unlawfully accessing, or exceeding authorized access to, a "protected computer," as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), "loss" is the reasonably foreseeable pecuniary harm to the victim, which typically includes costs such as conducting a damage assessment and restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service. The Commission does not intend that the cost to the government of prosecution and criminal investigation of an offense covered by this guideline will be included in the determination of loss, even if such costs are reasonably foreseeable. Likewise, in a product substitution case, the loss includes the victim's reasonably foreseeable costs of making substitute transactions and handling or disposing of the product delivered or modifying the product so that it can be used for its intended purpose, plus the victim's reasonably foreseeable cost of correcting the actual or potential disruption to the victim's business caused by the product substitution. Similarly, in a defense contract fraud case, loss includes the reasonably foreseeable administrative cost to the government and other participants of repeating or correcting the procurement action affected, plus any increased cost to procure the product or service involved that was reasonably foreseeable.

* * *

[Make all technical and conforming amendments necessary to fully execute this amendment.]

CLC PROPOSED 2001 LOSS TABLE

Loss	Loss Multiple	Offense Level Increase	Total Offense Level	Current MTMP
\$5,000 or Less	0	0	6	8 & 9
>\$ 5,000	2.0	+2	8	10
>\$ 10,000	2.0	+4	10 (includes +1 MTMP)	11
>\$ 20,000	2.0	+6	12 (includes +2 MTMP)	12
>\$ 40,000	2.0	+8	14 (begins severity incr. of +1 level)	13
>\$ 80,000	2.0	+10	16 (begins severity incr. of +2 levels)	14
>\$160,000	2.5	+12	18 (begins severity incr. of +3 levels)	15
>\$400,000	2.5	+14	20	17
>\$1.0M	2.5	+16	22	19
>\$ 2.5M	3.0	+18	24	21
>\$ 7.5M	2.7	+20	26 (begins severity incr. of +4 levels)	22
>\$ 20.0M	2.5	+22	28	24
>\$ 50.0M	2.5	+24	30 (begins severity incr. of +5 levels)	25

>\$125.0M	2.5	+26	32 (begins severity incr. of +6 levels)	26
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